

***United States Court of Appeals
for the Second Circuit***



**APPELLEE'S
APPENDIX**

76-2161

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
FELIX CASTRO, :
Petitioner-Appellant, : Docket No. 76-2161
-against- :
EUGENE LEFEVRE, Superintendent, :
Respondent-Appellee. :
-----X

APPENDIX TO APPELLEE'S BRIEF

On Appeal from an Order
of the United States District Court
for the Southern District of New York

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent-
Appellee
Office & P.O. Address
Two World Trade Center
New York, New York 10047

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

JOAN P. SCANNELL
Assistant Attorney General
of Counsel



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA, ex rel., X

FELIX CASTRO, X
PETITIONER X

-against- X

EUGENE S. Le FIVRE, SUPERINTENDENT X

CLINTON CORRECTIONAL FACILITY X

RESPONDENT X
-----X

STATE OF NEW YORK)
COUNTY OF CLINTON)

SS.:

Felix Castro, being duly sworn, deposes

and says:

That on the date of notarization below, he has forwarded
by United States Postal Service, true and accurate copies of the an-
nexed petition for a writ of habeas corpus, duly notarized to the
parties listed below:

Pro Se Clerk of the Court
United States District Court
Southern District of New York
Foley Square
New York, New York 10007

Attorney General's Office
2 World Trade Center
New York, New York 10047

Sworn to before me this

8 day of April 1976

Henry D. B. [Signature]
Notary Public

Notary Public
New York State
[Signature]

Respectfully submitted

Felix Castro
Felix Castro
Box B 74 A 1415
Barnemora, New York 12929

BEST COPY AVAILABLE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, ex rel.,
FELIX CASTRO,

Petitioner

-against-

EUGENE S. Le MEVRE, Superintendent
CLINTON CORRECTIONAL FACILITY

Respondent

NOTICE OF MOTION

STATE OF NEW YORK) SS.:

COUNTY OF CLINTON)

Please Take Notice, that upon the annexed motion for Federal Habeas Corpus proceedings, the Petitioner, Felix Castro, moves this Honorable Court for a hearing on the 26 day of April, 1976 or as soon thereafter as this Honorable Court may deem just, proper and in the interest of justice.

Respectfully submitted

Felix Castro

Felix Castro

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, ex rel.,

FELIX CASTRO.

PETITIONER

-against-

EUGENE S. Le FEVRE, SUPERINTENDENT

CLINTON CORRECTIONAL FACILITY

RESPONDENT

STATE OF NEW YORK)

COUNTY (F CLINTON)

FORMA PAUPERIS

TITLE 23 U.S.C.

SECTION 1915 (A)

33. :

Felix Castro, being duly sworn, deposes

and says:

That he is a poor person and most respectfully request that he be allowed permission to proceed with this habeas corpus proceeding against his illegal detention in the Clinton Correctional Facility, Dannemora, New York 12929.

That Petitioner is a poor person and unable to pay the necessary Court cost of this proceeding and any other proceeding in this Honorable Court by reason of filing this application and further that his application is being filed in good faith pursuant to Section 1915 (A), of Title 28 U.S.C.

Sworn to before me this

day of April 1976

Henry A. Wagner

NOTARY PUBLIC

Respectfully submitted

Felipe C. T. M.

Felix Castro
Box B 74 A 1115

Bannockburn, New York 12-29

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA, ex rel., X

Felix Castro, X

PETITIONER X

-against* X

EUGENE S. Le FEVRE, Superintendent X

Clinton Correctional Facility X

RESPONDENT X
-----X

STATE OF NEW YORK)
COUNTY OF CLINTON)

Petition For A Writ

Of

Habeas Corpus

Title 23 U.S.C

Section 2242, 2254

SS.:

Felix Castro, being duly sworn, deposes
and says:

That he is a citizen of these United States by virtues of birth and that he is presently illegally confined in the Clinton Correctional Facility at Dannemora, New York by the above named respondent, and that said confinement is most definitely illegal and that he is being deprived of his liberties in violation of his constitutional rights under the Fourteenth Amendments.

PRIOR PROCEEDINGS

Petitioner was convicted in the Bronx County Supreme Court. (Dollinger, J.) after a guilty plea, of robbery in the first degree (P.L. Section .15 (3) and sentencing him on April 25, 1974, to an indeterminate prison term with a minimum of 7½ years and a maximum of 15 years.

Timely notice of appeal was filed on June 6, 1974 to the Appellate Division First Judicial Department and leave to appeal was granted by that Court, and assigned William J. Gallagher as counsel on appeal.

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The conviction was unanimously affirmed by the New York

Supreme Court, Appellate Division First Judicial Department,

(People v. Felix Castro 375 N.Y.S. 2d 499)

decided November 13, 1975.

Leave to appeal to the New York Court of Appeals was denied on December 30, 1975. (See Exhibit "A" herein attached). This exhausted petitioner's State remedies.

STATEMENTS OF FACTS

Following the denial of petitioner's omnibus motion to suppress his statements, the complainant's identification, and items seized in a search of his car, (S, 111-111A),* petitioner pleaded guilty to robbery in the first degree to cover Ind. 2966/73, charging that crime, possession of a weapon as a misdemeanor, robbery in the second degree, and criminal possession of stolen property in the third degree. His plea also covered Ind. No. 3211/73.

Petitioner admitted essentially the same facts testified to by the complaining witness, Cesvaldo Vicente, at the suppression hearing: petitioner had knocked on the door of the gas station where Vicente worked at about one o'clock in the morning. When Vicente stepped out, petitioner grabbed him around the neck while the co-defendant, Angelo Lorenzi, thrust a knife at his stomach. The two men took the cash drawer, its contents, and an adding machine, and ran out.

* Numbers preceded by "H" refer to pages in the minutes of the hearing March 12 and 13, 1974; those preceded by "P" refer to the minutes of the plea proceeding March 14, 1974; those preceded by "S" refer to the minutes of sentencing April 23, 1974.

They were immediately apprehended by the police (H. 57-59).

✓ The prosecutor recommended acceptance of the plea and agreed that the People would make no objection to the Court's treating the plea as a "C" felony rather than a "B" felony at the time of sentencing (P. 2-3). Petitioner's co-defendant also pleaded guilty with the same understanding as to the scope of sentence (P. 3-7). There was no reference in this proceeding to the possibility that petitioner would be found to be a second felony offender or to the effect of such a finding on the ultimate range of sentence.

At the sentencing proceeding, the prosecutor stated that he had filed an information alleging that petitioner was a second felony offender (3. 2). After a brief consultation with petitioner, counsel agreed that petitioner had pleaded guilty to attempted manslaughter in the second degree, and had received a sentence of five years on June 30, 1967 (3. 3).

✓ Petitioner was never advised that he had a right to controvert the allegation, or that he had a right to a hearing on the matter, or that his admission would require the imposition of a minimum term equal to one-half of the maximum term.

Petitioner did not personally admit the prior felony.

Counsel made a strong plea for a sentence to a treatment program, on the grounds that petitioner's criminal involvement had arisen from his addiction, and offered a letter from the Riker's Island Referral Unit as an indication of petitioner's determination to rehabilitate himself (3. 4-6). Relying on the prior felony conviction in 1967 and two 1964 convictions which had resulted in probation terms, the court imposed an indeterminate prison term with a maximum of fifteen years and a minimum of seven and one-half years (S. 7-8).

ARGUMENTPOINT I

PETITIONER WAS DENIED DUE PROCESS OF LAW BY THE COURT'S FAILURE, PRIOR TO SENTENCING HIM AS A SECOND FELONY OFFENDER, TO ADVISE HIM THAT HE HAD A RIGHT TO CONTROVERT THE ALLEGATION OF A PREDICATE FELONY AND TO HAVE A HEARING ON THE MATTER, OR TO INFORM HIM OF THE CONSEQUENCES OF ADMITTING THE PREDICATE FELONY.

Due Process requires that a criminal defendant be given notice and an opportunity to be heard before he is sentenced as a multiple felony offender.* C.P.L. Section 400.21 implements this constitutional requirement by mandating that a defendant be asked whether he wishes to controvert any allegation in the predicate felony information and that a hearing be held if the uncontroverted allegations are not sufficient to support a predicate felony finding.* Here, however, petitioner was never told that he had the right to challenge the underlying felony conviction, either on factual or constitutional grounds, or that he had a right to a hearing if he did so. Since the court did not inform petitioner of the consequences of such an admission and petitioner never personally admitted the prior felony, there is no basis for believing that petitioner appreciated the implications of waiving the procedural rights afforded him under the statute. We submit, therefore, that petitioner was sentenced as a second felony offender without due process of law.

The necessity of strict compliance with the mandatory requirements of C.P.L. Section 400.21, as a guarantee of due process, is manifest, since there are several grave consequences which follow upon a defendant's admission of a prior felony: Under the second felony offender statute, P.L. Section 70.

06, a mandatory minimum term as great as 7 1/2 years can be imposed for a Class "C" felony, as it was in petitioner's case.* In addition, under C.P.L. Sec. 400.21 (7 (a)), petitioner's failure to challenge the constitutionality of the previous convictions at this point is deemed a waiver of the constitutional claim. Furthermore, under Sec. 400.21 (8) a finding of a predicate felony conviction is binding on petitioner in any future proceedings.

It cannot be said here, as it was in People v. Bryant, et. al., 47 A.D. 2d 51 (Second Dept., 1975), that the procedure employed complied with the spirit of the law or that petitioner was sufficiently aware of the implications of his admission to warrant finding a waiver of literal compliance with the law. In Bryant, the defendants admitted the predicate felony "in the face of advice by the court that it would be mandated . . . to impose on them the specified minimum sentences of imprisonment . . .". Such advice was never given petitioner, nor were the clearly mandatory provisions of C.P.L. Sec. 400.21 followed. The bare request that petitioner admit the predicate felony satisfied neither the letter nor the spirit of the law. Yet petitioner's admission -- made by his attorney --- subjected him to a substantially harsher penalty and waived any subsequent challenge to the predicate felony, whether factual or constitutional. To permit such severe consequences to flow from an admission made with no indication in the record that petitioner was informed of his rights under the statute or had reason to recognize the implications of waiving those rights, is a clear denial of due process of law. Petitioner's sentence as a second felony offender must be vacated and the case remanded for resentencing.

Wherefore, in view of the aforementioned, your petitioner prays that this writ be sustained and the judgment of conviction be vacated, and for such other and relief as to this court may seem just and proper.

Respectfully submitted

Felix Castro

Felix Castro

Box B 74 A 1415

Danvers, N.Y. 12929

Sworn to before me this

1 day of April, 1976

Henry B. Biquin

NOTARY PUBLIC

HENRY B. BIQUIN
Notary Public
Clinton Co. - State of N. Y.
Commission Expires March 31, 1977

AC.F.L. Sec. 400.21 (3) and (5) provide:

3. Preliminary examination. The defendant must be given a copy of such statement and the court must ask him whether he wishes to controvert any allegation made therein. If the defendant wishes to controvert any allegation in the statement, he must specify the particular allegation or allegations he wishes to controvert. Uncontroverted allegations in the statement shall be deemed to have been admitted by the defendant.

5. Cases where further hearing is required. Where the defendant controverts an allegation in the statement "and the uncontroverted allegations in such statement" are not sufficient to support a finding that the defendant has been subjected to a predicate felony conviction the court must proceed to hold a hearing. (11 A McKinney's Cons. L.N.Y. (Supp., 1975))

* The minimum which can be imposed on a first felony conviction (for a "C" felony) is between one and five years.

STATE OF NEW YORK
COURT OF APPEALS

BEFORE HON. DOMENICK L. GABRIELLI, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

CERTIFICATE
DENYING
LEAVE

against

FELIX CASTRO,
MOVANT-APPELLANT

I, DOMENICK L. GABRIELLI, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at DATE , New York

Dec. 30 , 1975

/s/ DOMENICK L. GABRIELLI
Associate Judge

*Description of Order: Order of the Appellate Division, First Judicial Department entered November 13, 1975 which affirmed a judgment of the Supreme Court, Bronx County rendered April 25, 1974.

SUPREME COURT : BRONX COUNTY
TRIAL TERM : PART 16

PLEA

THE PEOPLE OF THE STATE OF NEW YORK

-against-

FELIX CASTRO &
ANGELO LORENZI,

Defendants.

Bronx, New York
March 14, 1974

B E F O R E:

THE HONORABLE ISIDORE DOLLINGER,

Justice

APPEARANCES:

MARIO MERDLA, ESQ.
District Attorney, Bronx County
BY: BARRY BASSIK,
Assistant District Attorney
For the People

OSCAR GONZALEZ SUAREZ, ESQ.
For defendant Castro

MARVIN KESSLER, ESQ.
For defendant Lorenzi

FILED

MAY 21 1974

SUPREME COURT CLERK'S OFFICE
BRONX COUNTY

Kenneth A. De Corso
Court Reporter

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MR. SUAREZ: Your Honor, I have an application, if the Court pleses.

THE COURT: Yes.

MR. SUAREZ: This will be under the--

(Mr. Suarez talks to the assistant district attorney off the record.)

MR. SUAREZ: At this time your Honor, the defendant Felix Castro respectfully asks for permission to withdraw his plea of not guilty entered heretofore to indictment 2966 of '73 and respectfully requests, ~~xxx~~ asks that he be permitted to plead guilty to the the first count of indictment, robbery in the first degree, a B Felony, with the understanding that the district attorney will have no objection to your Honor treating this plea for the purposes of sentence as if the defendant had pleaded to an C Felony.

MR. BASSIK: That's correct, your Honor, The People would not object to your Honor if he sees fit to treating this as a C Felony for sentence. The People will take no position other than, they will not object to whatever your Honor sees fit in the way of sentence for these defendants.

MR. SUAREZ: On that plea, it will also encompass indictment number 3211 of '73, and all counts

therein.

MR. BASSIK: That's correct, your Honor.

THE COURT: The People recommend the acceptance of that plea?

MR. BASSIK: Yes sir, your Honor.

THE COURT: Can I get a copy of the indictment please? May I use your copy, Mr. Suarez?

MR. SUAREZ: Yes.

THE COURT: Is your name Felix Castro?

THE DEFENDANT CASTRO: Yes.

THE COURT: You heard your lawyer, Mr. Suarez, tell the Court that you wish to withdraw your not guilty plea heretofore entered and you now wish to plead guilty to the first count of this indictment, to the crime of robbery in the first degree, a Class B Felony, to cover Indictment Number 2966 of 1973, and this plea is intended to cover and does cover indictment number 3211 of 1973.

Is that correct?

THE DEFENDANT: Yes.

THE COURT: Now, have you spoken to your lawyer about this case and the fact that you want to plead guilty?

THE DEFENDANT: Yes.

PLEA

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THE COURT: Now, are pleading guilty of your own free will?

THE DEFENDANT CASTRO: Yes.

THE COURT: Do you understand that you have the right to a trial by jury and that you're given that right?

THE DEFENDANT: Yes.

THE COURT: Has anybody threatened you or forced you?

THE DEFENDANT: No.

THE COURT: Do you plead guilty to the fact that on or before September 21, 1973, acting together with Angelo Lorenzi, who is at the same counsel table with you this morning, acting together you forcibly stole certain property from one Oswaldo Di Centi (phonetic), having an aggregate value of \$150.00, which included money and an adding machine, and in the course of the commission of the crime, you had with you or you were armed with a knife. Is that correct?

THE DEFENDANT CASTRO: Yes.

THE COURT: Now, other than the recommendation that was made prior--other than the statement that was made by your lawyer and the acceptance by the

dis district attorney that upon the day of sentence the district attorney has no objection to me treating this as a case where I would sentence as a C Felony, which means that there would be a maximum of fifteen years, other than that, has there been any other promise or recommendation made by your lawyer or the assistant district attorney or anyone else as to what I will do on the day of sentence?

THE DEFENDANT CASTRO: No.

THE COURT: In view of the recommendation of the district attorney of the facts represented to the Court, this Court will accept the plea.

COURT CLERK: Felix Castro, is that your name?

DEFENDANT CASTRO: Yes.

COURT CLERK: And is this your attorney, Mr. Suarez who is by your side?

DEFENDANT SUAREZ: Yes.

COURT CLERK: You now wish to withdraw your plea of not guilty heretofore entered by you to indictment 2966 of 1973, and you now wish to plead guilty to robbery in the first degree, a Class B Felony, the first count of this indictment--'

THE COURT: B Felony?

COURT CLERK: B. The first count of this

indictment and 3211 of 1973, in addition?

DEFENDANT CASTRO: Yes.

COURT CLERK: Take the pedigree.

(Pedigree given.)

COURT CLERK: Sentence date, your Honor?

THE COURT: Yes. I'll give it to you right now.
April 17.

MR. BASSIK: Excuse me, your Honor?

THE COURT: April 17.

MR. BASSIK: Your Honor, I would just like to state that the People feel that this is an adequate plea giving the Court complete scope to deal with this matter, even though it's on the record, the People don't object if your Honor sees fit to treat this as a C.

THE COURT: All right.

Angelo Lorenzi, will you stand up please?

MR. KESSLER: Your Honor, the defendant Lorenzi respectfully offers to withdraw his plea of not guilty previously interposed and offers to plead guilty under indictment 2966 of '73 to the first count of said indictment, robbery in the first degree to cover the entire indictment and another indictment, 3211 of '73.

MR. BASSIK: That's correct, your Honor.

MR. KESSLER: With the understand that the defendant will be treated at the time of sentence as a Class C Felon.

THE COURT: The district attorney has no objection to me treating him as that?

MR. KESSLER: With the understanding that the district attorney has no objection to his being treated as a Class C Felon.

MR. BASSIK: That's correct, your Honor. The People would recommend the acceptance of this plea.

We point out that the defendant is 17 years of age. I believe he has no prior felony convictions. I feel that the plea to the B Felony gives the Court adequate scope upon sentence of this defendant and we would not object to the defendant being treated as a C if your Honor sees fit that that would be an appropriate sentence.

THE COURT: Is your name Angelo Lorenzi?

DEFENDANT LORENZI: Yes.

THE COURT: Have you heard your lawyer, Mr. Kessler, tell the Court that you too wish to withdraw your not guilty plea heretofore entered and you now wish to plead guilty to the first count of the

indictment number 2966 of 1973, to the crime of robbery in the first degree, a Class B felony to cover all counts in indictment 2966 of 1973, and by this plea, it's intended to cover and does cover indictment number 3211 of 1973. Is that what you want to do?

DEFENDANT LORENZI: Yes.

THE COURT: Have you spoken to your lawyer about this case and the fact that you want to plead guilty?

DEFENDANT LORENZI: Yes. Right.

THE COURT: Now, are you pleading guilty of your own free will?

DEFENDANT LORENZI: Yes.

THE COURT: Do you understand that you too have the right to a trial by jury and that you're giving up that right?

DEFENDANT LORENZI: Yes.

THE COURT: Has anybody threatened you or forced you to plead guilty?

DEFENDANT LORENZI: No.

THE COURT: Now you plead guilty to the fact that on or about September the 21st, 1973, you, together with Felix Castro, acting together, forcibly stole property from one Oswald Di Vicenti, having

an aggregate value of about \$150 in United States money and an adding machine, and during the course of the commission of the crime, there was threat to use or there was used a knife. Is that correct?

DEFENDANT LORENZI: Yes.

THE COURT: Well, other than the statement made by your lawyer in which the district attorney agreed to that on the day of sentence I should treat this as though I had taken a C Felony, which means a maximum of 15 years, has there been any other promise or recommendation made by your lawyer or the assistant district attorney or anybody else as to what I will do on the day of sentence? Has there been any other statement? Do you understand me?

Did anybody make any other promise or statement to you?

DEFENDANT LORENZI: No.

THE COURT: In view of the recommendation of the district attorney and the defense has rendered to the Court, the Court will accept the plea.

COURT CLERK: Angelo Lorenzi, is that your name?

DEFENDANT LORENZI: Yes.

COURT CLERK: Is this your attorney, Mr. Kessler

PLEA

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by your side?

DEFENDANT LORENZI: Yes.

COURTCLERK: You now wish to withdraw your plea of not guilty heretofore entered by you to indictment number 2966 of 1973, and you now wish to plead guilty to robbery in the first degree, a Class B Felony, the first count of this indictment to cover this indictment and indictment number 3211 of 1973 in addition, do you?

DEFENDANT LORENZI: Yes.

COURT CLERK: Take the pedigree.

(Pedigree given)

COURT CLERK: Date of sentence?

THE COURT: Same date: April 17.

* * * * *

I, KENNETH A. DE CORSO, A Court Reporter, do hereby certify the foregoing to be a true and accurate transcript of my stenographic notes.

DATED: May 17, 1974

